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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

113

NO. [redacted]

SOUTHWESTERN PORTLAND CEMENT COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 19__

No.

SOUTHWESTERN PORTLAND CEMENT COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on March 3, 1969.

OPINIONS BELOW

The Board's decision and order is reported at 169 NLRB No. 39.

The opinion of the Court of Appeals for the Fifth Circuit (R 184-194) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 3, 1969 (R 196); and a copy of this Judgment is appended to this petition in the Appendix at p. 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether N.L.R.B. agency procedures followed in this case denied Petitioner due process of law guaranteed it by the Fifth Amendment to the Constitution of the United States of America, and the Administrative Procedure Act, 5 U.S.C. §1001-1011.

2. Whether N.L.R.B. agency procedures followed in this case denied Petitioner the fair hearing to which it was entitled under the Fifth Amendment to the Constitution of the United States of America, and the Administrative Procedure Act, 5 U.S.C. §1001-1011.

CONSTITUTIONAL PROVISIONS, STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

"No person shall . . . be deprived of life, liberty or property without due process of law." Amendment 5, Constitution of the United States of America.

". . . No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the

reliable probative and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Administrative Procedure Act, 5 U.S.C. §1007 (c).

"The record in the proceeding shall consist of: The petition, notice of hearing, with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral arguments before the Regional Director, stipulations, exhibits, documentary evidence, affidavits of service, depositions, and any briefs or other documents submitted by the parties to the Regional Director." §102.68, Rules and Regulations of the N.L.R.B., Series 8 as amended.

". . . Immediately upon issuance of a Report on Objections or Challenges, or both, upon issuance by the Regional Director of an order transfering the case to the Board, or upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit the record to the Board." §102.67 (f), Rules and Regulations of the N.L.R.B., Series 8 as amended.

"Any such proceeding (unfair labor practice) shall, so far as practicable, be conducted in accordance with the Rules of Evidence applicable in the District Court of the United States, under the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pur-

suant to the Act of June 19, 1934 (U.S.C. Title 28, §723-b, §723-c)." §102.39, Rules and Regulations of the N.L.R.B., Series 8 as amended.

"The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Rule 56 (c), Federal Rules of Civil Procedure.

STATEMENT

This case involves measuring the summary proceedings used by the N.L.R.B. and its agency officials to dispose of Petitioner's contentions against the requirement of due process and a fair hearing under law.

Petitioner herein filed objections to conduct affecting the result of a representation election.

The agency involved (National Labor Relations Board) processed this case under summary judgment procedures which have been extensively used by it only in recent years. The basic facts not in dispute are as follows:

The Petitioner timely filed Objections to Conduct Affecting the Result of Election (R. 50), along with sworn testimony in affidavit form, with the agency's Regional Director in Fort Worth, Texas (R. 176-182). The Union also submitted testimony in affidavit form to the Regional Director (R. 175). The proceedings at the Regional Director level consisted of an ex parte investigation and the issuance of a Report on Objections by the Regional Director. No hearing, no opportunity

to cross-examine any witness or rebut the source of the evidence accepted as true by the Regional Director, was afforded Petitioner.

The Regional Director forwarded his report, along with Petitioner's objections, to the N.L.R.B. in Washington, in accordance with §102.67 (f) and §102.68 of the Board's Rules and Regulations; but kept in his office in Fort Worth, Texas, all testimony in affidavit form submitted by the parties to the controversy, in violation of §102.67 (f) and §102.68 of the Board's Rules and Regulations (R. 167-172). The Petitioner filed Exceptions to the Report (R. 61) with the Board in Washington, with Exceptions (unsupported by any affidavit testimony; which was still in Fort Worth, Texas) were summarily overruled by the N.L.R.B., purportedly "upon the entire record." (R. 98)

In order to obtain judicial review, Petitioner refused to bargain; and a complaint, charging a violation of §8 (a) (5) and §8 (a) (1) of the National Labor Relations Act, 29 U.S.C. 158, was issued (R. 79-85). Petitioner answered (R. 91-93). A Motion for Summary Judgment was filed by the government (R. 100-104); which was summarily granted by the Trial Examiner (R. 134-143) without oral argument or hearing, and without independent consideration or review of the documentary or affidavit testimony and evidence in the representation case; and without reviewing the further sworn testimony in affidavit form filed by the Petitioner with the Trial Examiner. The Trial Examiner's position was that he was bound by the Board's previous consideration, had no right of independent

consideration, and had "no authority to review the Board's final disposition of the representation issues or to question its conclusions" (R. 138). It is well to point out here that the Board's "conclusions" had been previously rendered without benefit of any documents of an evidentiary nature, or having probative force as evidence, before it. These documents were still in the Regional Director's file in Fort Worth.

The Petitioner filed Exceptions (R. 145-146) and a Motion to Reconsider (R. 148-159) with the Board in Washington. The Board adopted the findings, conclusions and recommendations of the Trial Examiner.

Upon petition to review and set aside the order of the Board, filed by the Petitioner, the Court of Appeals held that, though it was agency error to fail to forward to the Board in Washington the affidavit testimony submitted by the parties, still this error did not deny Petitioner due process or a full and fair hearing in this case.

The Court of Appeals further held that neither the Board nor the Trial Examiner was required to review or consider at the complaint ("C" case) stage the evidence put into the record at the representation ("R" case) stage of the proceeding (R. 193).

REASONS FOR GRANTING THE WRIT

A full and fair hearing is guaranteed by the Fifth Amendment. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 147-155 (1941).

Even within the framework of a summary judgment proceeding, a litigant is entitled to due process, and a full and fair summary "hearing." A full and fair consideration and review of affidavit testimony in a summary proceeding is as essential to due process as is the consideration of oral testimony in a trial-type hearing.

The decisions below should be reviewed; because even the "hearing" envisioned by our Federal summary judgment procedures under the Federal Rules of Civil Procedure were denied the Petitioner.

No agency official whose duty it was to decide the issues in this case ever had before him for consideration or review the complete record in this case. Neither the N.L.R.B. in Washington — on the two occasions this case was before it — nor the Trial Examiner considered the affidavit testimony submitted by the parties in the proceedings. The affidavits submitted to the Regional Director remained in the Regional Director's file in Fort Worth, contrary to the requirements of §102.67 (f) and §102.68 of the Board's Rules and Regulations, Series 8 as amended.

The further affidavit submitted by the Petitioner to the Trial Examiner (R. 125-128) was not considered by him. This is clear from the Trial Examiner's statements is his decision, as to what he conceived his function to be in the summary proceedings then taking place. This further affidavit testimony was — like the affidavit testimony still in the Regional Director's file in Fort Worth, Texas — entitled under law to be

considered. It was filed in an unfair labor practice proceeding; which, we are told, is to be conducted in accordance with the rules of evidence applicable in the District Courts of the United States, under the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States. §102.39, Rules and Regulations of the N.L.R.B., Series 8 as amended. Under Rule 56 (c) of the Federal Rules of Civil Procedure, concerning summary judgment procedures, it is provided that, "the adverse party (Petitioner here) prior to the day of hearing may serve opposing affidavits."

In spite of these plain procedural requirements, which were not complied with by agency officials, the decision of the Court of Appeals holds that Petitioner was accorded the due process and "hearing" to which it was entitled.

A further question on the right to be heard of great and recurring significance in the administration of the National Labor Relations Act is here presented. What is the true function of a Trial Examiner in the unfair labor practice ("C") case, when faced with a motion for summary judgment in proceedings such as these: May he merely reject and refuse to admit all evidence, as was done here, and adopt the Board's determination of the matter in the representation ("R") stage, without even so much as thumbing through the affidavit or transcript testimony? The Trial Examiner's ruling in this case presupposes that the Board's decision in the "R" case precludes the Board from benefiting from the expertise indigenous to a Trial Ex-

aminer's review. To so hold would be to deprive the parties of the right to have initial determinations of fact and law made in an "adversary" proceeding. The result is, that under circumstances comparable to the case at bar, §10 of the Act becomes merely a proceeding without substance, designed solely to "rubber-stamp" decisions taken in a "non-adversary" representation case; so that the appellate court can review the entire record. Our reading of the legislative history and case law fails to disclose an adequate basis for such an emasculation of the Trial Examiner's function. If that had been the true intention of the Congress, it would have provided for certifications in "R" cases to be directly appealable to the courts. Congress chose not to follow this course. Instead, it made Board certifications reviewable by the Board after review by a Trial Examiner.

These are valuable rights, the denial of which ignores due process and the right to be fully and fairly heard. Especially is this so in summary proceedings such as we have here.

One cannot dispute that safeguards to due process and a fair hearing are incorporated into our Rules of Evidence and Federal Rules of Civil Procedure. These rules of evidence and procedure are, by law, made applicable to the "C" case over which the Trial Examiner presides, 29 U.S.C.A. §160; §102.39, Rules and Regulations of the N.L.R.B., Series 8 as amended; but are expressly stated to be not "controlling" in the "R"

case. §102.66 (a), Rules and Regulations of the N.L.R.B., Series 8 as amended.

If the Trial Examiner in the "C" case is permitted to refuse to independently review and consider the evidence in the "R" case, as was done here, under his interpretation of this Court's holding in *Pittsburgh Plate Glass, supra.*, it becomes clear that the safeguards to due process and a full and fair hearing are thereby lost.

Finally, the decisions of the Trial Examiner and the Board in this case are in conflict with the Board's position in *Southern Airways Company,* 124 N.L.R.B. 749, footnote 2; and the Board's position in *Leonard Niederriter Company, Inc.,* 130 N.L.R.B. 113, footnote 2 and at 115, n.2. The Court of Appeals decision in this case, to the effect that the Trial Examiner and the Board were correct in refusing to admit any evidence taken in the "R" case in the "C" case proceeding, is in conflict with the District of Columbia Court of Appeals in *Amalgamated Clothing Workers of America v. N.L.R.B.,* 365 F.2d 898 (CCA D.C. 1966). It is submitted that the rule announced by the Supreme Court in *Pittsburgh Plate Glass Company, supra,* does not operate procedurally to limit a Trial Examiner's authority to make independent review of, or consider at the "C" case level, the Board's "R" case decision. *Pittsburgh* merely announced a rule of evidence, to the effect that one trial on the issue is enough. Said another way, one record or one transcript of testimony on the matter is enough. Neither the Trial Examiner nor the Board need allow the parties time to put on evidence

which is merely cumulative. The Supreme Court, however, in *Pittsburgh,* did not say that one consideration of the record at the "R" case level was enough to impose 8(a) (5) sanctions upon a party; nor did *Pittsburgh* announce a rule of limitation upon the statutory obligations and duties of the Board or the Trial Examiner to review and consider the evidence in the proceedings at the "C" stage. §7 (c) of the Administrative Procedure Act requires a consideration of the whole record at the "C" stage, when it provides, "No sanction shall be imposed or rule or order be issued, except upon consideration of the whole record. . . ." (5 U.S.C. §1007 (c)).

The cumulative effect of the various failures of agency officials to follow procedural requirements of law in this proceeding has been to effectively deny this Petitioner due process of law and a full and fair hearing, and make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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_____

Attorneys for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25791

SOUTHWESTERN PORTLAND CEMENT COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review an Order of the National Labor Relations Board (Texas Case)

(February 10, 1969)

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

MORGAN, Circuit Judge: This case is before this court upon the petition of Southwestern Portland Cement Company, hereinafter referred to as the Company, to review and set aside an order of the National Labor Relations Board, hereinafter referred to as the Board. It is another of those increasingly frequent cases in which an employer has objections to the conduct

of a representation election and, in order to obtain judicial review of his contention, refuses to bargan with a certified union thus violating Section 8(a) (5) and (1) of the National Labor Relations Act, 29 U. S. C. 158 (a) (5), and causing a Board order directing bargaining upon request to be issued.

The objections of the Company to the election in this case are directed to certain alleged misrepresentations in a telegram issued by the Union and posted by it on the Company's plant bulletin board on the day of the election and to the procedure used by the Board in determining the findings and conclusions which it reached. We believe that the Company's objections are not valid and hereby enforce the Board's order.

On August 23, 1966, the Union filed a petition with the Board for a representation election. The Company and the Union stipulated to, and the Board's Regional Director approved, an election to be held pursuant to the Board's regulations. On February 9, 1967, the Board conducted the election here disputed, and the Union won that election by a vote of 25 to 20 with no ballots being challenged.

Subsequently, the Company filed timely Objections to Conduct Affecting the Result of the Election. After receiving notice from the Regional Director to present relevant evidence, the Company submitted affidavits in support of its objections, and the Union submitted the affidavit of Lyle W. Johnson, the union organizer at the Odessa, Texas plant of the Company.

As we have said before, the Company specifically objected to a certain telegram which stated:

> "Rumor Ten Dollars Dues Local 49 Completely False. Dues Five Dollars Fifty Cents for Six Years. Rash Of Arbitration Cases Caused By Company Mangling Working Agreement Reduced Our Treasury. Members Voted Five Dollar Assessment For Three Years To Recoup. Of Ten Arbitration Cases, Nine Awarded Union. Membership Solidly Supporting Union And Current Bargaining Program."

The Regional Director issued a Report on Objections, recommending that the Company's Objections to Conduct Affecting the Result of the Election be overruled, and concluding, based upon findings of fact in his Report, that the Contents of the telegram in question are not material misrepresentations of fact. The Report finds that because of processing arbitration cases, the Union treasury had been depleted; and the other local had voted a $5.00 assessment for three months.

The Regional Director then transmitted his Report on Objections to the Board. Along with this report were sent the Company's exceptions to the report. In support of these exceptions the Company submitted certain documents which were also sent to the Board. However, the Regional Director did not forward to the Board the Company's affidavits and exhibits in support of its Objections to Conduct Affecting the Result of the Election.

On June 20, 1967, the Board found that the Company's exceptions raised no material or substantial issues of fact or law which would warrant reversing the Regional Director's findings and recommendations. Accordingly, it adopted them and certified the Union.

On August 10, 1967, the General Counsel issued a complaint alleging that the Company had violated Section 8 (a) (5) and (1) of the act by refusing to bargain with the Union on request. In its answer, the Company admitted most of the allegations in the complaint, but challenged the validity of the certification, complaining that it was improperly denied a hearing on its objections.

On October 30, 1967, the Trial Examiner found that the Company had not shown that there was any newly discovered evidence with regard to its objections and that it had presented no factual issue which warranted a hearing. Accordingly, he granted the motion for summary judgment and found that the Company had violated Section 8 (a) (5) and (1) of the act. Thereafter, the Company filed objections, along with a motion to reconsider the determination in the representation proceeding.

On January 11, 1968, the Board, affirming the Trial Examiner, found that the Company had violated Section 8 (a) (5) and (1). Since, as the Board observed, the Company's position in the representation case had been previously considered by the Board, and the Board found that there were no material or substantial issues of fact or law which would warrant reversal of

the Regional Director's findings, the Board denied the Company's motion to reconsider the determinations made in the representation case. The Board's order requires the Company to cease and desist from the unfair labor practices found, and it directs the Company to bargain upon request and to post appropriate notices. The order is reported in 169 NLRB No. 39.

Four issues are presented on this appeal, each of which will be discussed fully by the court.

The first issue is whether or not the Board should have set aside the representation election because of the assertions in the telegram. We believe that the Board was correct in not setting aside the election.

It must be kept in mind that the burden is on the party objecting to the conduct of the representation election to prove that there has been prejudice to the fairness of the election. *NLRB v. Mattison Machine Works*, 365 U. S. 123, 5 L. Ed. 2d 455 (1961); *Home Town Foods, Inc. v. NLRB*, 379 F. 2d 241 (5 Cir., 1967). The burden thus assumed is a heavy one. *Shoreline Enterprises of America, Inc. v. NLRB*, 262 F. 2d 933, 942 (5 Cir., 1959). In discharging this burden the Company must show that such false statements as may have been made *in fact* constituted an interference with a free choice of bargaining representatives; it is obvious that every false statement does not. *Anchor Manufacturing Company v. NLRB*, 300 F. 2d 301, 303 (5 Cir., 1962); *NLRB v. Trinity Steel Company*, 214 F. 2d 120, 123 (5 Cir., 1954).

In the exercise of its discretion in matters relating to election propaganda, the Board does not undertake to police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to the opposing parties the task of correcting inaccurate and untruthful statements. *Linn v. United Plant Guard Workers,* 383 U. S. 53, 60, 15 L. Ed. 2d 582, 588 (1966). The Board exercises caution in setting aside elections because of inaccurate campaign propaganda and will set aside an election only where a material fact has been misrepresented in the representation campaign; opportunity for reply has been lacking; and the misrepresentation has had an impact on the free choice of the employees participating in the election. *Linn v. United Plant Guard Workers,* supra.

We think that the Company has failed to sustain its burden of establishing the requisite unfairness in the conduct of the election and that the findings of the Board that the election was fairly conducted is supported by substantial evidence on the record taken as a whole. The telegram in question, in essence, merely outlined the events and presented the Union's side of the story, namely, that while the union employees at the other plant were paying $10.50 per month, a clear distinction should be drawn between regular dues assessed on an indefinite basis and a special three-month assessment which accounted for $5.00 of the current payments at the other plant. At most, the Union was engaging in that sort of campaign propaganda which could reasonably be evaluated by the employees and which, therefore, was not sufficient to prevent

the exercise of the employees' free choice. *Anchor Manufacturing Co. v. NLRB,* supra, at 303. The Company did not show that the Union's assertions *in fact* constituted an interference with a free choice of bargaining representative, and the Board was justified in overruling the Company's objections to the election.

The second issue is whether or not the affidavits in support of the Company's objections should have been forwarded to the Board as part of the record in this case. We believe that the Regional Director should have sent these affidavits to the Board, but the failure to do so did not constitute so gross an error as to warrant setting the election aside.

Section 102.68 of the Board's Rules and Regulations provides:

> "The Record in the proceeding shall consist of: The petition, notice of hearing, with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral arguments before the Regional Director, stipulations, exhibits, documentary evidence, affidavits of service, depositions, and any briefs or other documents submitted by the parties to the Regional Director".

The affidavits in question are certainly "other documents submitted by the parties to the Regional Director".

In determining what constitutes the record before the Board, the Third Circuit has held that in both representation and complaint proceedings before the National Labor Relations Board, all pleadings, rulings, documents, etc., constitute the record before the Board. *NLRB v. Botany Worsted Mills,* 133 F. 2d 876 (3 Cir., 1943).

The Court believes, however, that the Board's not having the affidavits before it was not harmful error in the case at hand as the Company's exceptions before the Board incorporated the contents of the affidavits and the contents of the telegram. We do not see how there is anything of relevance asserted in the affidavits that was not alleged in the Company's exceptions to the Report on Objections. Therefore, the election should not be set aside because the affidavits in the case at hand were not before the Board.

The third issue is whether or not the Company was entitled to a hearing in the representation case. We hold that the Company was not entitled to such a hearing.

There is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues crucial to the determination of whether NLRB election results are to be accepted for purposes of certification. *NLRB v. Bata Shoe Company,* 377 F. 2d 821 (4 Cir., 1967); See also *NLRB v. Air Control Products of St. Petersburg, Inc.,* 335 F. 2d 245, 249 (5 Cir., 1964); *NLRB v. O. K. Van Storage, Inc.,* 297 F. 2d 74, 76 (5 Cir., 1961). In order to be entitled to a

hearing, the objecting party must supply the Board with specific evidence which prima facie would warrant setting aside the election. *NLRB v. O. K. Van Storage, Inc.*, supra. *United States Rubber Company v. NLRB*, 373 F. 2d 602, 606 (5 Cir., 1967).

In the representation proceeding, the Company was afforded full opportunity to submit to the Regional Director evidence in support of its objections to the election. Such evidence was submitted and considered by the Regional Director, and following the Regional Director's Report on Objections, the Company filed exceptions and supporting evidence which were considered by the Board. To this extent, the Company was heard in that it was accorded the right to present evidence, given notice of all adverse findings, and an opportunity to rebut those findings.

A good summary of the law on this point was given by Judge Hutcheson in *NLRB v. O. K. Van Storage, Inc.*, supra, at p. 76:

> "Nowhere in the Act is there a specific requirement that the Board conduct post-election hearings on objections to the conduct of elections; rather, it is implicit in the Act that questions preliminary to the establishment of the bargaining relationship be expeditiously resolved, with litigious questions reserved for the proceedings for review or enforcement of Board orders. The Board nonetheless makes it a practice to hold post-election hearings on objections to elections, but in keeping with the

> spirit of the Act does so only when it appears that the allegations relied on to overturn the election have a basis in law and that there is evidence to support them. The opportunity for protracted delay in certification of the results of representation elections which would exist in the absence of reasonable conditions to the allowance of a hearing on objections is apparent. An objecting party who fails to satisfy such conditions has no cause for complaint when and if his demand for a hearing is denied".

Accordingly, this court holds that the Company was not entitled to a hearing in the representation case.

The last issue is whether or not the Board should have admitted evidence relating to the representation proceeding in the unfair labor practice proceeding. We hold that the Board was correct in not admitting such evidence.

Where, as here, the employer refuses to recognize the certified union, the representation and unfair labor practice proceedings are really one, and a single trial of the representation issue is enough. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U. S. 146, 158, 85 L. Ed. 1251, 1261 (1940). The law seems well established that it is not error for the Board in an unfair labor practice proceeding of the sort here involved to exclude evidence relating to the unit determination if that evidence is not newly discovered or was not otherwise available at the representation hearing. *NLRB v. Douglas Coun-*

ty Electric Membership Corp.; 358 F. 2d 125 (5 Cir. 1966); *NLRB v. Air Control Products of St. Petersburg, Inc.*, supra. The Company has made no such demonstration. Therefore, the court holds that the Board did not err in refusing to admit the evidence in question.

ORDER ENFORCED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed: Mar. 3, 1969

SOUTHWESTERN PORTLAND CEMENT COMPANY,
Petitioner,

versus No. 25,791

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of Southwestern Portland and Cement Company, to re-

view the order of the National Labor Relations Board issued against Petitioner, its officers, agents, successors, and assigns on January 11, 1968, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on December 4, 1968, and has considered the briefs and the transcript filed in this cause. On February 10, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and that Southwestern Portland Cement Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: MAR 3 1969

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25791

SOUTHWESTERN PORTLAND CEMENT COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board (Texas Case)

(April 7, 1969)

ON PETITION FOR REHEARING

Before GOLDBERG and MORGAN, Circuit Judges and LIEB, District Judge.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SOUTHWESTERN PORTLAND CEMENT COMPANY,
Petitioner,

versus No. 25791

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON CONSIDERATION OF THE APPLICATION of the Petitioner in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above

mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 18th day of April, 1969.

/s/ Lewis R. Morgan
UNITED STATES CIRCUIT JUDGE

(ORIGINAL FILED - APRIL 21, 1969)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1392

SOUTHWESTERN PORTLAND CEMENT COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 12-22) is reported at 407 F. 2d 131. The Board's decision and order in the unfair labor practice case (R. 134-143, 160-161)[1] are reported at 169 NLRB No. 39. The

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[1] "R." refers to the Transcript of Record filed in the court below. "S.R." refers to the Supplemental Record, also filed below.

underlying decisions in the representation proceedings (R. 51-60, 97-99) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1969 (Pet. 22-23), and the Company's petition for rehearing was denied on April 7, 1969 (Pet. 24). The petition for a writ of certiorari was filed on May 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that the employer was not prejudiced by the omission from the record before the Board of affidavits which he had submitted in support of his objections to a representation election.

2. Whether the Board properly refused to permit the employer to relitigate in an unfair labor practice proceeding issues which had previously been determined in a related representation proceeding.

STATEMENT

The Company filed timely objections to a Board representation election conducted among its Odessa, Texas, employees following the victory of the United Cement, Lime, and Gypsum Workers International Union, AFL-CIO, Local 476. Specifically, the Company alleged that the Union had made a fair election impossible by posting at the plant, on the day of the election, a telegram which materially misrepresented

the Union's dues structure and the volume of its arbitration cases (R. 52-54). In accordance with Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. Sec. 102.69(c)), the Regional Director undertook an administrative investigation of the Company's objections, and requested the parties to present relevant evidence. The Company submitted the affidavits of several Company officials and employees, and the Union submitted the affidavit of the organizer in charge of the Odessa campaign (S.R. 13-20). Upon consideration of these affidavits, the Regional Director issued a Report on Objections in which he found that the telegram in question contained no material misrepresentations of fact, and recommended that the Company's objections be overruled (R. 53-58).

The Regional Director forwarded his report to the Board, together with the Company's objections, but retained in his files the affidavits submitted during the investigation (Pet. 14). The Company's exceptions to the Report on Objections, however, set forth the substance of the affidavits and also presented additional documentary evidence (R. 61-78). After reviewing the Regional Director's report, the Company's exceptions, and the attached documentary evidence, the Board found that the exceptions raised no substantial or material issues of fact or law which would warrant reversing the Regional Director's findings and recommendations (R. 99). Accordingly, the Board adopted those findings and recommendations, and certified the Union (R. 98-99).

Thereafter, the Company refused the Union's request to bargain, the Union filed unfair labor practice

charges, and a complaint was issued alleging that the refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (R. 79, 84, 89-90). In its answer, the Company admitted most of the allegations of the complaint, but challenged the certification on the ground that it was improperly denied a hearing on its objections (R. 91-93). The Board's General Counsel then moved for summary judgment, and, after consideration of the Company's opposition, the Trial Examiner granted the motion. He concluded that, since the Company offered no newly discovered or previously unavailable evidence concerning the certification, no new proceedings were necessary (R. 137-138). Accordingly, he held that the Company had violated the Act as charged; the Board affirmed the Examiner's decision and ordered the Company to bargain, upon request, with the Union (R. 160-161).

The court of appeals enforced the Board's order. It agreed that the assertions in the Union's telegram did not impair the validity of the election (Pet. 16-18), and held that, although the affidavits submitted by the Company to the Regional Director in support of its objections "should have been forwarded to the Board as part of the record in this case," the failure to do so was not prejudicial since "the Company's exceptions before the Board incorporated the contents of the affidavits and the contents of the telegram" (Pet. 19). Finally, the court held that the Company was entitled neither to an evidentiary hearing on its objections, since no material issues of fact were raised, nor to relitigate in the unfair labor practice case issues that

had been fully litigated in the representation case (Pet. 19-22).

ARGUMENT

1. The principal issue raised in the Company's petition—whether the Board erred in ruling on the Company's objections without considering its supporting affidavits—is not an issue in this case. The court of appeals agreed with the Company that the affidavits should have been included in the record before the Board, but ruled that this "was not harmful error in the case at hand as the Company's exceptions before the Board incorporated the contents of the affidavits and the contents of the telegram" (Pet. 19). This ruling was clearly correct. The Company had submitted six affidavits (S.R. 14-20). One, that of the Company's industrial relations director, asserted that the objected-to telegram misrepresented the amount of dues another local of the Union charged the Company's plant in Victorville, California, and the number and disposition of arbitration cases at that plant (S.R. 14-15). These same contentions were developed in detail in the Company's exceptions to the Regional Director's report (R. 64-73). The remaining affidavits consisted merely of statements by Company officials and employees to the effect that they had read the Union's telegram and that in their opinion, it had had an effect on the outcome of the election (R. 16-20). Since the affidavits contained nothing of substance which was not otherwise presented to the Board, their exclusion from the representation case record was not a denial of due process. "The Constitution pro-

tects procedural regularity not as an end in itself, but as a means of defending substantive interests." *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2, 1949).

2. The court's endorsement of the Board's refusal to allow relitigation of the Company's objections to the election in the unfair labor practice proceeding was also correct. It is well settled that, in the absence of newly discovered or previously unavailable evidence, the Board need not permit relitigation in a subsequent unfair labor practice proceeding of issues which have been previously determined in a related representation proceeding. *Tennessee Packers, Inc.* v. *National Labor Relations Board*, 379 F. 2d 172, 179 (C.A. 6), certiorari denied, 389 U.S. 958; *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408, 414-416 (C.A. 3); *Neuhoff Brothers, Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, 613 (C.A. 5), certiorari denied, 386 U.S. 956; *Macomb Pottery Co.* v. *National Labor Relations Board*, 376 F. 2d 450, 452 (C.A. 7). "The unit proceeding and [the] complaint on unfair labor practices are really one." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158; see also *id.*, at 161-162.[2] Although the Company requested the

[2] *Amalgamated Clothing Workers* v. *National Labor Relations Board*, 365 F. 2d 898 (C.A.D.C.), does not conflict with these settled principles. There the court expressly recognized the validity of the Board's rule precluding relitigation where, as here, the employer seeks to justify a refusal to bargain on the ground that an earlier Board certification of representative is invalid. The court held only that where "the part of the charge involved in the relitigation issue is not refusal to bargain, but rather interference with rights of organiza-

Board to consider an additional affidavit in the unfair labor practice proceeding, it did not even assert that this document contained any newly discovered or previously unavailable evidence (R. 109-128).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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tion, the [representation and unfair labor practice] proceedings are not so related as to foreclose presentation to the Board of the underlying issues." *Id.* at 905. See *Niederriter Co.*, 130 NLRB 113.

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